Major Entrepreneur Sdn Bhd v YAB Menteri Besar Kedah & Ors

HIGH COURT (ALOR SETAR) — CIVIL SUIT NO 21-12-2010
SEE MEE CHUN J
28 APRIL 2014

Contract — Joint venture — Joint venture agreement — Whether terms of joint venture breached — Whether innocent party entitled to remedies sought — Whether part of claim time-barred under Public Authorities Protection Act 1948 — Whether counterclaims filed by guilty parties baseless

The plaintiff and the second defendant ('D2') entered into a joint-venture agreement ('JVA') to develop a project known as Kedah International Resort City. A joint venture company ('KRC') was incorporated on 19 December 1995 to carry out the project. The fifth defendant ('D5') was nominated to be D2's agent in seeing to the implementation of the project and D2's 40% shareholding in KRC was to be held by D5. D2's primary obligation under the JVA was to transfer state land for the project to KRC within six months of its incorporation and to cause private lands to be acquired and alienated to KRC. The plaintiff's obligation under the JVA was, inter alia, to cause the authorised and paid-up capital in KRC to be increased. The plaintiff did increase those capital amounts in KRC to RM5m. D5 held RM2m worth of the shares (ie 2 million shares) but they were paid for by the plaintiff. When D2 failed to carry out its obligation to transfer the state land to KRC causing the master plan for the project to lapse in 1996 and the approved lay-out plan to lapse in 2003, the plaintiff brought the instant action to declare that the first ('D1'), second, third ('D3') and fifth defendants (the claim against the fourth defendant was withdrawn) had breached the JVA. The plaintiff, inter alia, sought damages and orders to compel D2 to transfer the land as agreed and for the 2 million shares D5 held in KRC to be transferred to its name. D1, D2 and D3 counterclaimed for a declaration that it was the plaintiff which had breached the JVA. They also wanted the plaintiff to pay for 40% of the amount that had been expended to acquire private lands. D5 counterclaimed for the plaintiff to pay 40% of the proceeds of sale it had received from the sale of low-cost houses it had developed on land D2 had sold to the plaintiff.

Held, dismissing the claim against D1, D2 and D3, allowing the claim against D5 and dismissing all the counterclaims:

(1) As D1, D2 and D3 were public authorities, the limitation period of 36 months under the Public Authorities Protection Act 1948 applied to defeat the plaintiff's claim against them. D2 ought to have transferred the

state land to KRC within six months of its formation which meant the land had to be transferred latest by 18 December 1996. The earliest from when time began to run was in 1996 when the master plan for the project lapsed. The latest was in 2003 when the approved layout plan similarly lapsed. As time ran from the date of breach, and taking 2003 as the latest possible date of breach, the plaintiff's claim filed on 12 July 2010 was time-barred (see paras 8–9).

(2) The 2 million shares held in KRC by D5 were paid for by the plaintiff. The plaintiff testified that a letter of demand dated 2 April 2010 was sent to D5 to repay within 14 days the amount the plaintiff had paid on the shares and that the breach occurred when D5 failed to heed the letter of demand. The court found the claim for D5 to transfer the 2 million shares to the plaintiff was within time and had been proved (see paras 13–14).

(3) There was no basis to the counterclaim by D1, D2 and D3. Although the plaintiff did not dispute D2 had expended monies for the acquisition of private lands, the evidence showed, and it was also conceded, that the acquired lands were never transferred to KRC or to D5 (see para 15).

(4) D5's counterclaim failed as what it sought was not part of the project. Because resettlement of squatters became a problem in the course of land acquisition, D2 sought the plaintiff's assistance to relocate the squatters and sold two pieces of land to the plaintiff for low-cost houses to be built. The evidence showed the plaintiff had paid for those lands (see para 16).

[Bahasa Malaysia summary

Plaintif dan defendan kedua ('D2') memasuki perjanjian usaha sama ('PUS') untuk membangunkan projek yang dikenali sebagai Kedah International Resort City. Syarikat usaha sama ('KRC') ditubuhkan pada 19 Disember 1995 untuk menjalankan projek tersebut. Defendan kelima ('D5') dicalonkan untuk menjadi ejen D2 dalam memerhatikan pelaksanaan projek dan 40% pemegangan saham D2 dalam KRC dimiliki oleh D5. Tanggungjawab utama D2 di bawah PUS adalah untuk memindahkan tanah negeri untuk projek kepada KRC dalam enam bulan sejak penubuhannya dan untuk menyebabkan tanah persendirian diambil alih dan dipindahkan kepada KRC. Tanggungjawab plaintif di bawah PUS adalah, antara lain, untuk menyebabkan modal berbayar dan dibenarkan dalam KRC dinaikkan. Plaintif telah menaikkan jumlah modal dalam KRC kepada RM5 juta. D5 memegang RM2 juta nilai saham (iaitu 2 juta saham) tetapi ia dibayar oleh plaintif. Apabila D2 gagal untuk menjalankan tanggungjawabnya untuk memindahkan tanah negeri kepada KRC menyebabkan pelan induk untuk projek luput dalam tahun 1996 dan pelan susun atur yang yang diluluskan luput pada tahun 2003, plaintif membawa tindakan ini untuk mengisytiharkan bahawa defendan-defendan pertama ('D1'), kedua, ketiga

('D3') dan kelima (tuntutan terhadap defendan keempat ditarik balik) telah melanggar PUS tersebut. Plaintif, antara lain, memohon ganti rugi dan perintah untuk memaksa D2 memindahkan tanah seperti yang dipersetujui dan untuk 2 juta saham yang dipegang oleh D5 dalam KRC dipindahkan kepada namanya. D1, D2 dan D3 menuntut balas untuk perisytiharan bahawa plaintif yang memungkiri PUS tersebut. Mereka juga mengkehendaki supaya plaintif membayar 40% daripada jumlah yang telah dibelanjakan untuk memperolehi tanah-tanah persendirian. D5 menuntut balas untuk plaintif membayar 40% daripada keuntungan jualan yang ia terima daripada jualan rumah kos murah yang dibangunkannya atas tanah yang D2 telah jual kepada plaintif.

Diputuskan, menolak tuntutan terhadap D1, D2 dan D3, membenarkan tuntutan terhadap D5 dan menolak kesemua tuntutan balas:

(1) Memandangkan D1, D2 dan D3 adalah pihak berkuasa awam, tempoh had masa 36 bulan di bawah Akta Perlindungan Pihak Berkuasa Awam 1948 diguna pakai untuk mematahkan tuntutan plaintif terhadap mereka. D2 patut memindahkan tanah negeri kepada KRC dalam tempoh enam bulan dari masa penubuhannya yang bermaksud tanah dipindahkan sekurang-kurangnya pada 18 Disember 1996. Masa awal adalah daripada apabila masa mula berjalan pada tahun 1996 apabila pelan induk untuk projek luput. Terbaru adalah pada tahun 2003 apabila pelan susun atur yang diluluskan juga luput. Memandangkan masa berjalan dari tarikh kemungkiran, dan mengambil kira 2003 sebagai kemungkinan tarikh kemungkiran terbaru, tuntutan plaintif yang difailkan pada 12 Julai 2010 adalah dihalang masa (lihat perenggan 8–9).

(2) Dua juta saham yang dipegang dalam KRC oleh D5 dibayar oleh plaintif. Plaintif memberi keterangan bahawa surat tuntutan bertarikh 2 April 2010 dihantar kepada D5 untuk dibayar balik dalam masa 14 hari jumlah yang plaintif telah bayar ke atas saham-saham dan bahawa kemungkiran berlaku apabila D5 gagal untuk memberi perhatian kepada surat tuntutan. Mahkamah mendapati tuntutan untuk D5 memindahkan 2 juta saham tersebut kepada plaintif dalam masa dan telah dibuktikan (lihat perenggan 13–14).

(3) Tidak terdapat asas kepada tuntutan balas oleh D1, D2 dan D3. Walaupun plaintif tidak mempertikaikan D2 telah membelanjakan wang untuk mengambil alih tanah persendirian, keterangan menunjukkan, dan ia juga bersetuju, bahawa tanah yang diperolehi tidak pernah dipindahkan kepada KRC atau kepada D5 (lihat perenggan 15).

(4) Tuntutan balas D5 gagal memandangkan apa yang dipohonnya bukan sebahagian projek tersebut. Oleh kerana penempatan semula setinggan menjadi masalah dalam pemerolehan tanah tersebut, D2 memohon bantuan plaintif untuk menempatkan semula setinggan dan menjual 2

bidang tanah kepada plaintif untuk rumah kos rendah dibina. Keterangan menunjukkan plaintif telah membayar untuk tanah-tanah tersebut (lihat perenggan 16).]

Notes

For cases on joint venture agreement, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 5444–5448.

Cases referred to

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

Legislation referred to

Public Authorities Protection Act 1948

Apparao Apana (Sabrina bt Mohamed with him) (Tengku Azlina, Rao, Low & Co) for the plaintiff.
Fariza bt Hamzah (Legal Officer, Kedah Legal State Offices) for the first, second and third defendants.
Victor Paul (Abdul Halim Said & Co) for the fifth defendant.

See Mee Chun J:

[1] This is plaintiff's claim against D1–D3 and D5 for a declaration the defendants have breached joint venture agreement ('JV') dated 8 November 1994, D2 transfers the land as listed, D5 to transfer 2 million shares, the sum of RM22,329,971 being development of the project and general damages. The claim against D4 has been withdrawn. D1–D3 counterclaims for a declaration the plaintiff had breached JV and the plaintiff to pay 40% of land acquisition cost which had been paid by them. D5 counterclaims for the accounts on the sale and purchase of houses on HSD 18386 and the plaintiff to pay 40% of the proceeds received.

[2] From the agreed facts in 'D' and 'F', P and D2 had entered into the JV and a shareholders agreement ('SA') also dated 8 November 1994. D1 is the *Menteri Besar*, D2 the state government, D3 the State Secretary who signed both agreements and D5 the implementing agency for the project. The JV was to develop a project known as Kedah International Resort City and for this purpose a joint venture company was to be formed.

[3] The primary issue relates to breach of JV.

[4] In the statement of claim the plaintiff states the project area to be approximately 1125.2 acres of state land including forest reserve and approximately 290.7 acres of private land. This is disputed by the defendants

who state the project area to be 1,406.19 acres consisting of state land (963 acres), forest reserve (158 acres), acquired private land (148.17 acres) and private land of which acquisition was not yet completed (142.53 acres). It was further pleaded the application for forest reserve land was not approved by D2 and the plaintiff had agreed to it.

[5] In respect of the joint venture company ('JVC') which was agreed to be formed (cl 2.1), cl 2.2 of JV required it to have an initial issued and paid up capital of RM2 consisting of two ordinary shares of RM1 each while cl 2.3 provided the first two shares would be issued to D2/nominee and the plaintiff. It was agreed in cl 2.4 any increase in the authorised and paid up capital would be in the proportion of 40% to D2/nominee and 60% to the plaintiff. The share capital of JVC and all matters relating to JVC shall be set out in SA (cl 2.5). The obligations of D2 are set out in cl 3, of which the primary obligation is to transfer the state land to JVC as its equity contribution within six months from the formation or within such extended time and to cause the private land to be compulsorily acquired and thereafter alienated to JVC. The plaintiff's obligation in cl 4 was to cause JVC to increase its authorised and paid up capital and subscribe in cash for such portion of the increased capital of JVC in the proportion of its shareholding. JVC obligation in cl 5 was to pay to the relevant authority the exact compensation determined by the land collector to be paid to land owners for the acquisition of the private land and to be responsible for the entire cost and expenses of the project.

[6] The plaintiff had two witnesses Ong Jin Leong ('PW1', auditor and witness statement marked as P1) and Syed Sarfaraz Haider Rizvi ('PW2', director and shareholder and witness statements marked as P2 and P2A). D5 had one witness Abdul Rahman bin Hj Din ('DW1', currently *Pengurus Operasi (Kumpulan)* and previously *Penolong Pengurus (Perancangan)* and witness statement marked as D3). D1—D3 had two witnesses Rohani bt Abu Bakar ('DW2'), *Pengarah Jabatan Perancang Majlis Perbandaran Sungai Petani* and witness statement marked as D4) and Isahak bin Murat ('DW3' Land Administrator Kuala Muda and witness statement marked as D5).

[7] It is an agreed fact the JVC had been formed with the incorporation of Kedah Resort City Sdn Bhd ('KRC') on 19 December 1995 to carry out the project on a joint venture. It is further an agreed fact D5 would be D2's agent in implementing the project and D2's 40% interest in KRC would be held by D5.

CLAIM AGAINST D1–D3

[8] As evident from the terms of JV the obligation of D2 was to transfer the state land to KRC as its equity contribution within six months from the

formation or within such extended time and to cause the private land to be compulsorily acquired and thereafter alienated to KRC (cl 3). D1—D3 does not appear to dispute the land was never transferred to KRC. This is apparent from its written submission where in its conclusion at p 6 it is stated 'diakui memang telah berlaku kemungkiran perjanjian ini sejak awal-berdasarkan perenggan 3 perjanjian-defendan telah gagal untuk memberi tanah kepada syarikat usahasama seperti yang diperuntukkan dalam perjanjian'. However D1–D3 contend limitation applies as at the earliest time began to run was in 1996 from when the master plan for the project lapsed or the latest in 2003 when the approved layout plan similarly lapsed. The lapse was due to the failure to transfer the state land.

[9] In this instant case D2 ought to have transferred the state land to KRC within six months from its formation or within such extended time. KRC was incorporated on 19 December 1995 which meant the state land had to be transferred latest by six months from 19 December 1995 that is 18 June 1996. P is not relying on extension of time for the transfer and in any event no evidence was adduced on this. Instead it was submitted by the plaintiff time starts from when it gave its notice of demand dated 23 June 2009 (B2 313–315). In *Nasri v Mesah* [1971] 1 MLJ 32 it was stated in held (2) 'a cause of action accrues on the date of breach and in the case of actions founded on contract, therefore, the time runs from the breach'. It was PW1's evidence in Q & A 36 at p 22 that 'due to the delay and failure of D2 to alienate the state land based on the revised plan within the required time, the approved layout plan was again lapsed'. As time runs from the date of breach this court agrees with D1–D3 contention that taking 2003 as the latest possible date of breach when the approved layout plan lapsed due to the failure to transfer the state land, the plaintiff's claim filed on 12 July 2010 would be time barred. The notice of demand is not in relation to when the breach occurred. As D1—D3 are public authorities the limitation of 36 months in Public Authorities Protection Act 1948 applies. The time bar is only in relation to the plaintiff's claim against D1–D3.

CLAIM AGAINST D5

[10] As against D5 the consideration for limitation is different as what is being claimed is essentially the return of 2 million shares in KRC. Time does not run from the date when it sent in the application for alienation on 4 July 2005 and no decision was made. Although D5 is not a party to JV and SA it was to act as D2's agent and D2's interest in KRC was held by D5. The JV recognised D2 could have a nominee.

[11] The evidence of PW2 with reference to B2 324 is that the authorised share capital of KRC is RM5 million divided into 5 million ordinary shares of

RM1 each and its paid up capital is RM5 million divided into 5 million ordinary shares of RM1 each. B2 324 which is a letter dated 1 February 2010 from the secretarial agent for KRC also shows the details of shareholders with the plaintiff holding 2,999,998 shares and D5 2m. It also had had the statement 'In accordance with the accounting records of the company we hereby confirm that the shares held by Permodalan Kedah Berhad in Kedah Resort City Sdn Bhd are all paid by Major Entrepreneur Sdn Bhd'. PW2 was not cross-examined on the fact the plaintiff had paid for the shares on D5's behalf but on whether the plaintiff was entitled to the 2 million shares. PW2 disagreed the state's contribution was more than RM2m. He was also asked that as the state's share was in the form of land he could not ask for the 2 million shares as all the state had to do was transfer the land he disagreed as the state did not transfer the land which was to be adjusted against the 2 million shares paid by the plaintiff. He agreed that the number of shares was not stated in SA and there were blanks in the amount of increased paid up capital in SA. In re-examination he said there was a resolution to increase the paid up capital and there were documents filed with SSM in B2 273–276 and there was no objection from D2 or D5. It was also the evidence of DW1 D5 held 2 million shares in KRC which was equivalent to RM2 million and they had been paid by the plaintiff.

[12] Article II of SA (B1 22–24) dealt with share capital and matters relating thereto. It provided as follows:

> 2.01 The JVC shall upon incorporation and no later than ... days from the date of this Agreement increase its authorised capital to Ringgit Malaysia ... (RM ...) divided into ... shares of Ringgit Malaysia One (RM1.00) each.
>
> 2.02 The JVC shall increase its authorised and paid up capital from Ringgit Malaysia Two (RM2.00) to Ringgit Malaysia ... (RM ...) consisting of ... ordinary shares of Ringgit Malaysia One (RM1.00) each (hereinafter referred to as 'the initial paid up capital').

[13] Although the amount of increased paid up capital was left blank in SA this does not negate the fact the 2 million shares held in KRC by D5 was paid by the plaintiff, a fact confirmed by its own witness and that of PW2 and B2 324. The document filed with SSM in B2 273–276 also shows the total paid up capital to be 5 million shares of RM1 with the paid up capital of RM5m. There is no ambiguity in the amount of increased paid up capital.

[14] PW2 said a letter of demand to D5 dated 2 April 2010 in B2 325 for payment on D5's behalf for payment of allotment of shares was sent. It was only when there was no repayment did the breach occur such that time runs from when D5 failed to pay by the date given of 16 April 2010. The claim for D5 to transfer the 2 million shares to the plaintiff is within time and has been proved.

D1–D3'S COUNTERCLAIM

[15] This counterclaim is for 40% of RM4.611m paid by D2 for the acquisition of private land. Although the plaintiff does not dispute the money had been paid the evidence of DW3 shows the land was not transferred to KRC or D5. In fact it had been conceded there was no transfer of land. As such there is no basis to the counterclaim.

D5'S COUNTERCLAIM

[16] This counterclaim is for 40% of the proceeds of the sale and purchase of houses on HSD 18386. The agreed facts are that in the course of land acquisition resettlement of squatters became a problem prompting D2 to seek the plaintiff's assistance to relocate the squatters. D2 offered to sell two pieces of land of approximately 110 acres to the plaintiff in order that low cost houses could be built. The plaintiff paid RM1,711,196.83 on 12 September 2002. The fact of payment by the plaintiff is evident in B2 337–340 and 342–344 with the Form 5A notices in B2 336 and 341. This was not part of the project as confirmed by the evidence of DW3. Accordingly the counterclaim fails.

CONCLUSION

[17] The plaintiff's claim against D1–D3 is dismissed on the ground of limitation, the plaintiff's claim against D5 in para 44(c) is allowed, D1–3's counterclaim in para 42 is dismissed and D5's counterclaim in para 42(ii) is dismissed. Each party is to bear its own costs.

Claim against D1, D2 and D3 dismissed, claim against D5 allowed and all the counterclaims dismissed.

Reported by Ashok Kumar